

Subject: Comments on Proposed Critical Habitat for the Southern Resident Killer Whale
From: "Catherine Hamborg" <chamborg@earthjustice.org>
Date: Mon, 14 Aug 2006 16:08:19 -0700
To: <orcahabitat.nwr@noaa.gov>

Attached please find Earthjustice's comments on the proposed critical habitat for the Southern Resident killer whale. Please let me know if you need any additional information.

<<Orca Critical Habitat Comments.pdf>>

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August 14, 2006

Donna Darm
Chief, Protected Resources Division
1201 N.E. Lloyd Blvd., Suite 1100
Portland, OR 97232-1274

Re: Proposed Critical Habitat for the Southern Resident Killer Whale

Dear Ms. Darm:

As a preliminary matter, I want to congratulate NOAA Fisheries (also National Marine Fisheries Service or NMFS) for taking the initiative to designate critical habitat without being forced to do so and for proposing to designate a large portion of the inland waters that comprise the Southern Resident's range without making economic exclusions. Along with the listing itself, the critical habitat designation puts into play the Endangered Species Act ("ESA") safety net that offers hope to move these orcas away from being at critical extinction risk and toward recovery.

While the proposal is a laudable effort, there are three principal legal defects that should be remedied in the final designation: (1) the exclusion of near-shore habitat; and (2) wholesale military exclusions. While other comments will provide scientific information with respect to these issues and other aspects of the proposed critical habitat designation, these comments address the legal underpinnings of these proposed conclusions.

Background

On June 15, 2006, NMFS announced its proposal to designate critical habitat for the Southern Resident killer whale. 71 Fed. Reg. 34,571 (June 15, 2006). While the agency proposes to designate 2,564 square miles of marine habitat, it has proposed to exclude eighteen military sites from the critical habitat designation. *Id.* NMFS also stated that it does not consider areas with less than twenty feet of water to be occupied by the species and has therefore not proposed to designate these areas as critical habitat, although the agency has requested information on the use of such waters by Southern Residents. 71 Fed. Reg. at 34,574.

Near-Shore and Off-Shore Exclusions

In proposing to exclude the near-shore, NMFS has employed an unduly narrow definition of occupied habitat. As courts have recognized, "any land, whether the listed species occupies

the land or not, may take on critical habitat status. Whether and how an area becomes critical habitat first depends on whether a listed species occupies that area.” Cape Hatteras Access Pres. Alliance v. U.S. Dep’t of Interior, 344 F. Supp.2d 108, 119 (Dist. D.C. 2004). Under the ESA, it is possible for both occupied and unoccupied habitat to be designated as critical habitat, but the two classifications have different statutory requirements. Critical habitat is defined by the Act in two different ways: first, it is defined to include areas within the geographic area occupied by the species which possess physical or biological features essential to the conservation of the species, and which may require special management considerations. 16 U.S.C. § 1532 (5)(A)(i); second, it is defined to include areas outside the geographic area occupied by the species if those areas are found by NMFS to be “essential for the conservation of the species.” Id. at § (5)(A)(ii). All designations of critical habitat are to be made “on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation.” 50 C.F.R. § 424.12(a).

When considering the designation of critical habitat, the agency is instructed to “focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species.” Id. at § 424.12(b). For this proposed designation, NMFS has identified three such primary constituent elements (“PCEs”): (1) Water quality to support growth and development; (2) Prey species of sufficient quantity, quality and availability to support individual growth, reproduction and development, as well as overall population growth; and (3) Passage conditions to allow for migration, resting and foraging. 71 Fed. Reg. at 34,573. Any habitat that is ultimately designated will be shown to possess one or more of these three characteristics. The “best scientific data available” requirement and the mandatory identification of PCEs apply to both occupied and unoccupied areas.

It is unquestionable that the near-shore areas are important to provide water quality to support orca growth and development. It is also beyond dispute that the near-shore areas are essential to produce prey species of sufficient quantity, quality, and availability for orca feeding. Indeed, the Southern Residents’ preferred prey – chinook salmon – spend critical periods in their early life stages in estuaries where they feed and grow to sufficient sizes to survive in the ocean. In recognition of the importance of these areas to chinook, NMFS has designated near-shore marine areas as critical habitat for Puget Sound chinook from the line of extreme high tide out to a depth of 30 meters. 70 Fed. Reg. 52,688 (Sept. 2, 2005).

The proposed exclusions are predicated on the view that the Southern Residents do not physically occupy the shallow areas, but there is no question they occupy adjacent areas. While it may make sense to draw a line at high tide to reflect the orcas’ marine status, it is arbitrary to draw another line in the water. For example, in the recent salmon critical habitat designations, NMFS drew the line at the water’s edge and excluded riparian lands since they are not physically occupied by the salmon (although it had previously designated such areas). Moreover, in practice, a line in the water seems unworkable since nothing separates the two areas. Dumping toxics on one side of the line impacts the water that moves throughout the water in the

contiguous area. Drawing the line at 20 feet is arbitrary given the unitary nature of the water bodies and the lack of any rational basis for that dividing line in the water.

Military Exclusions

NMFS has proposed excluding wholesale 18 areas for national security reasons based on the ESA's balancing test authorizing exclusions where NMFS "determines that the benefits of exclusion outweigh the benefits of specifying such area as part of critical habitat." This authority is qualified in two respects: (1) the exclusion must be specific to a particular area; and (2) the exclusion cannot result in the species' extinction.

Notably, the ESA has another provision that can exclude military lands from critical habitat but that provision was **not** invoked here. Under a 2003 amendment, critical habitat may not include military lands subject to an integrated national resources management plan. 16 U.S.C. § 1533(a)(3)(B)(i). Such plans, however, are prepared only for military installations, defined to encompass military lands. 16 U.S.C. § 670(1). Since the Southern Resident critical habitat designation extends only to water, this provision is inapplicable and NMFS does not purport to invoke it. Interestingly, the military agencies must prepare such plans in cooperation with the Department of the Interior, not the Department of Commerce, presumably since Congress had lands, not waters, in mind. Id. § 670a(a).

The wholesale exclusion of portions of Puget Sound and related waters is overbroad for three reasons. First, the balancing that can be the basis for an exclusion must focus on the particular area. Adding up all the areas subject to proposed exclusions and saying that they constitute only a certain percentage of the total habitat may address the issue of extinction risk, but does not strike a balance that justifies excluding the particular area. Instead, the balancing should focus on the particular activities at each site that impact critical habitat and the importance of that habitat to the orcas.

Second, in undertaking the balancing, NMFS should focus only on the added protections afforded by the critical habitat designation on both sides of the equation. NMFS has identified only three primary constituent elements ("PCE") or essential biological and physical features that form the basis for the critical habitat designation: (1) water quality; (2) prey availability; and (3) safe passage conditions. Notably, sound is no longer identified as a PCE.

For the military exclusions under this approach, if it is sonar or other noise-generating activities that may impact the orcas, it is the listing, not critical habitat designation, that would curtail or require mitigation for the harm to the orcas. Such activities should, therefore, not be considered in the balancing of national security and conservation benefits for such military areas, since the military sonar activities would be affected by the listing in any event. On the other hand, if the military activities that impact the orcas are from stormwater discharges or disposal

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activities, it is difficult to see how modifying those activities to avoid adversely modifying critical habitat would impact military readiness.

Third, in other critical habitat designations, military areas that have been excluded tend to be reserved for exclusive military use. This does not appear to be the case with all of the proposed military exclusions here. We are aware of no situation where some activities or users of an area have been excluded from critical habitat, while other activities or users are covered. Since such a user-based exclusion would be an oddity under the statutory scheme, NMFS should include in its balancing all uses of any area that is open to nonmilitary uses, not just the military uses. For example, if the admiralty inlet area is a transit zone for both orcas and numerous nonmilitary vessels, excluding the area based solely on the national security rationale offered by the military addresses only a portion of the potential degrading activities that could harm the orcas. Such an outcome could expose the orcas and their habitat to extremely degrading activities without the safeguards afforded by critical habitat designation.

Sincerely,

A handwritten signature in black ink, appearing to read "Patti Goldman", with a stylized, flowing script.

Patti Goldman
Managing Attorney